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No.: **ICC-01/04**
Date: **5 April 2006**

THE APPEALS CHAMBER

Before: **Judge Navanethem Pillay, Presiding**
Judge Philippe Kirsch
Judge Georghios M. Pikis
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Under Seal
Ex Parte, Prosecution Only

Prosecutor's Supplementary Submissions in Compliance of the Appeals Chamber's 29 March 2006 "Order Pursuant to Regulation 28 of the Regulations of the Court for the Prosecutor to Respond to Questions"

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Introduction

1. On 29 March 2006, the Appeals Chamber issued its "Order Pursuant to Regulation 28 of the Regulations of the Court for the Prosecutor to Respond to Questions".[1] In that Order, the Chamber directs the Prosecution to respond questions pertaining to the *ex parte* and under seal filing of the appeal brought by the Prosecution against Pre-Trial Chamber I's 10 February 2006 "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58",[2] and to the applicability of Article 19 (3) to the current proceedings. The Prosecution is requested to respond to these questions by Wednesday, 5 April 2006.

2. The Prosecution will provide answers to both sets of questions following the categorization of the Chamber's Order below.

***Ex Parte* and Under Seal Filing of the Appeal**

3. The Prosecution is requested to explain (a) the factual basis and (b) the legal basis for the filing of the appeal (i) "under seal" and (ii) "*Ex parte*, Prosecution only". In answering part (b), the Prosecution is further requested to make specific reference to the provisions of the Statute, the Rules and the regulations of the Court, as well as any other authorities relied upon.[3]

The factual basis

4. The appeal lodged by the Prosecution necessarily had to be filed *ex parte* and under seal, since such was the level of protection attached by the Pre-Trial Chamber to the decision being appealed.[4] Had the Prosecution filed a document with a different, lower level of protection, the Prosecution would have effectively acted in violation of a protective order issued by a Chamber of this Court. Under the Court's legal regime, no participant is authorized to unilaterally vary protective measures ordered by a Chamber, a decision that can only be reached by a judicial body properly seized with the matter.[5]

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[1] ICC-01/04-133-US-Exp; hereinafter, the "Order".
[2] ICC-01/04-01/06-1-US-Exp; hereinafter, the "10 February 2006 Decision".
[3] Order, p. 2.
[4] See Decision Concerning Supporting Materials in Connection with the Prosecution's Application for Warrants of Arrest Pursuant to Article 58, 20 January 2006, ICC-01/04-102-US-Exp (hereinafter the "20 January 2006 Decision"), p. 4 (deciding on the appropriate level of confidentiality and conducting of proceedings) and 10 February 2006 Decision, para. 140, *inter alia*, maintaining the same level of confidentiality.
[5] For a clear example, see Regulation 42, in particular sub-regulation 3.

5. The original level of protection was properly determined by the Pre-Trial Chamber on the basis of a specific request made by the Prosecution in its Application for Warrants of Arrest.[6] In this respect, the Prosecution had made the following factual submissions in relation to Bosco Ntaganda[7] to the Pre-Trial Chamber, pertaining both to the necessity of arrest and to the need to provide for the highest levels of confidentiality:

- Public awareness of the Application, related proceedings and/or the Pre-Trial Chamber's determination prior to the completion of all necessary arrangements allowing for any unsealing could cause Bosco Ntaganda to hide, flee, including by crossing borders to neighboring countries, thus obstructing arrest efforts, and/or otherwise obstruct or endanger the investigation or the proceedings of the Court.[8]

- It could reasonably be anticipated that public knowledge of the Application, related proceedings and/or the Pre-Trial Chamber's determination would soon result in Bosco Ntaganda being informed about them.[9]

- The risk of obstruction of arrest efforts and/or endangerment of the investigation and any related proceedings was high in the case of Bosco Ntganda, who at the time of the filing of the Application was (and still is) at large and had the necessary means and connections to do so.[10]

- Bosco Ntaganda is currently one of the highest members of a militia engaged in acts of violence: after refusing to take up a proposal to be integrated in the regular armed forces of the DRC (FARDC) as a brigadier general and to join the peace process, Bosco Ntaganda took part in the foundation of a new, heavily armed militia group, the MRC. The MRC,

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[6] ICC-01/04-98-US-Exp, filed on 12 January 2006 (hereinafter, the "Application"), at para. 7, requesting that (a) the Application be received under seal; (b) the fact of the existence of the Application be also sealed; (c) any proceedings connected to the Application be held *ex parte* and in closed session; (d) any determination made by the Pre-Trial Chamber to issue warrants of arrest be sealed from the public until such time as the necessary arrangements are in place for unsealing.
[7] The Prosecution also made submissions related to Thomas Lubanga Dyilo, which, in light of his current situation, are not relevant for the purposes of these supplementary submissions.
[8] Application, paras. 8 and 9.
[9] Application, para. 9.
[10] Application, para. 9

comprised of former UPC and FPLC members, is currently fighting the FARDC.

- As one of the MRC's principal commanders, Bosco Ntaganda has successfully avoided being located and apprehended by the DRC authorities, supported by MONUC, following a request for arrest of the Prosecutor of Bunia first and later an arrest warrant issued against him. In May 2005 Bosco Ntaganda was able to attack FARDC forces in Bunia.[11]
- Bosco Ntaganda would be in a position to cause harm to victims and witnesses, in particular to those living in the region of Ituri. Referred to as "the Terminator", he is known as violent and brutal, having on numerous occasions killed persons for no apparent reason. Bosco Ntaganda reportedly intimidates the population in Ituri, including in recent times, resulting in the local population fearing him.[12]
- Bosco Ntaganda has been said to be responsible for the early 2004 attack on MONUC troops outside Bunia, resulting in one UN peacekeeper being killed. He is currently a leading figure in the MRC, aiming at destabilizing the region of eastern DRC by all means, including the commission of crimes.[13]

6. This is the factual basis supporting the *ex parte* and under seal character of the Pre-Trial Chamber's Decision, first, and then of the subsequent proceedings, including this appeal. The Prosecution submits that the facts enumerated above make a powerful case for affording the highest level of confidentiality, and that accordingly the Pre-Trial Chamber's determination of the appropriate level of confidentiality should remain undisturbed and continue to apply to the instant proceedings. Any disclosure at this stage of the existence of an application for a warrant of arrest against Bosco Ntaganda and its related proceedings, be it deliberate or unintentional, poses very serious risks to the life and well-being of victims and witnesses, the integrity and efficiency of ongoing investigative efforts and the prospects of success of any future arrest efforts, if and when the appeal is allowed and an arrest warrant is ultimately issued.

[11] Application, para. 201.
[12] Application, para. 202.
[13] Application, para. 203.

7. The Prosecution further submits that developments in the field subsequent to the arrest of Thomas Lubanga Dyilo and his transfer to the seat of the Court reaffirm the need to maintain the current proceedings *ex parte* and under seal. As explained in the declaration made by the Team Leader responsible for the team conducting the DRC investigation, Bernard Lavigne, attached to this filing,[14] the tensions in the Ituri area have recently increased, with several militia groups engaging in armed operations and a renewal of large scale violence. In this context, a number of OTP witnesses have expressed fears and concerns as to possible retaliatory actions.

The legal basis

8. The Appeals Chamber requests the Prosecution to identify the legal authority supporting the filing of the appeal (i) "under seal" and (ii) "*Ex parte*, Prosecution only". The Prosecution submits that both protective labels are (a) supported by legal provisions of the Statute aimed at protecting victims and witnesses, the confidentiality of information and the success of ongoing investigative efforts, (b) firmly rooted in existing international criminal practice, and (c) recognized by the Court's nascent jurisprudence.[15]

(a) Victim and witness protection

9. The use of these security and handling labels is firstly supported by existing provisions, case-law and practice pertaining to the protection of victims and witnesses. Article 68 (1) provides that the Court "shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." The Prosecutor "shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." In turn, Article 57 (3) (c) empowers Pre-Trial Chambers to provide for the protection of and privacy of victims and witnesses, where necessary.

10. Article 68 (1) is a provision of wide scope. This is evidenced by the fact that "appropriate measures" in this context have been considered to entail "all those

[14] Annex II - Declaration by Bernard Lavigne.
[15] The label "Ex parte, Prosecutor only" implies that only the Prosecutor and the Chamber seized with the matter will have access to the document; "under seal", in turn, implies a modality of enhanced confidentiality, whereby only a confined number of copies of the document is distributed under specific handling modalities. It is the Prosecution's understanding that the Regulations of the Registry define "under seal" in this manner.

enlisted in rule 75 of the ad hoc tribunals, as well as other arrangements…".[16] It is clear that Article 68 (1) encompasses sealed and *ex parte* filings. This is reflected in both Rules 87 and 88, which provide two of the procedural avenues for the implementation of Article 68 (1). Under Rule 87 (2) (e), a motion or request "may be filed *under seal*, and, if so filed, shall remain sealed unless otherwise ordered by a Chamber". In turn, Rule 88 (4) provides "A motion or request filed under this rule may be filed *under seal*".[17]

11. The Prosecution submits that the above-referred provisions equally reflect the admissibility of *ex parte* filings as a means to ensure proper protection, where required. One commentator has noted in relation to Rule 88 that "the initial Australian proposal on the rule did not permit *ex parte* applications for special measures. However at the second session there was a clear preference to allow *ex parte* applications and to enable the court to hold in camera hearings to consider such applications. As finally adopted Rule 88 allows an application for a special measure to be made, if necessary, on an *ex parte* basis or in camera (or both). This outcome imbues the court with a significant degree of flexibility."[18]

12. Apart from the drafting history quoted above, the text of Rule 88 also reflects the possibility of making *ex parte* filings: Rule 88 (3) provides "For inter partes motions or requests filed under this rule, the provisions of rule 87, sub-rules 2 (b) to (d), shall apply mutatis mutandis". *A contrario*, the reference to *inter partes* motions or requests as an apparent *subset* of the filings falling within Rule 88 indicates that certain filings in this context may *not* be *inter partes*. This rationale equally applies to applications that are filed both *ex parte* and under seal, which are implicitly supported by Rule 88 (4).[19] Finally, Rule 88 also allows a Chamber to hold *ex parte* hearings for the purposes of deciding on a request for special measures.

13. The requirements of Article 68 are reiterated in the context of disclosure in the rules of procedure and evidence. Rule 81 (3) provides that where "…steps have

[16] Donat-Catin, "Article 68", in Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (1999) at p 875.
[17] Under Rule 74 (7) (d), a Chamber may also seal any record of the proceedings in order to give effect to the assurances required for the purposes of compelling a witness to provide a potentially incriminating answer.
[18] Brady, "Protective and Special Measures for Victims and Witnesses" in Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (2001), pp 448-449.
[19] See Rule 88 (4), second sentence: "Any responses to *inter partes* motions or requests filed under seal shall also be filed under seal".

been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance."

14. This review shows that the filing of *ex parte* and under seal court documents, and the issuance of decisions and orders on the same basis by Chambers of this Court is a protective measure that the Prosecution can properly request in its applications and that Chambers of this Court can grant under their authority to protect victims and witnesses (Article 68 (1) and 57 (3) (c), *inter alia*). This is consistent with the existent international criminal practice, as described by the case-law of the ad hoc Tribunals and the Special Court of Sierra Leone: for instance, in the *Milosevic* case, the ICTY confirming Judge not only decided that there be no disclosure of the accompanying material until the arrest of all the accused, on the basis of the Prosecutor's submission that the enormous power which the accused, together and individually, wielded over the territories in which many of the witnesses still lived at that point in time put those witnesses in grave danger of physical harm if they were identified before all of the accused were arrested; it also authorized non-disclosure of the indictment and other related materials for the time necessary in order to minimize the risks for OTP staff as well as the staff of other international, governmental and humanitarian agencies.[20]

15. Ad hoc Tribunals practice reflects several other examples of sealed or confidential and *ex parte* filings being made where such filings impact upon victim/witness protection.[21] Analogous approaches have been taken in the context of disclosure in the Special Court for Sierra Leone. In *Kallon*,[22] Judge Thompson granted a Prosecution request for an order to Registry to keep the disclosed material under

[20] *Prosecutor v Milosevic et al*, IT-99-37, Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999
[21] See e.g. the filings discussed in *The Prosecutor v Bizimungu et al*, ICTR-99-50-AR73.4, Decision on Motions to Seal Annexure "A" to the Prosecutor's Appeal Brief, 16 April 2004, *Prosecutor v Milosevic*, IT-02-54-T, Decision on Confidential and Ex Parte Prosecution Motion for Protective Measures for Witnesses Testifying during the Croatia Phase of the Trial, 2 July 2003, *Prosecutor v Seselj*, IT-03-67-PT, Decision on Prosecution's Sixth Motion for Protective Measures for Witnesses, 8 December 2005.
[22] *The Prosecutor v Kallon*, SCSL-2003-07 -PT, Decision on the Prosecution Motion to Allow Disclosure to the Registry and to Keep Disclosed Materials under Seal until Appropriate Protective Measures are in Place, 17 April 2003.

seal until orders for appropriate measures for witnesses, victims, and non-public materials have been issued.

(b) Protecting ongoing investigative efforts

16. The Prosecution further submits that the preservation of the efficiency and the integrity of the investigation – one of the rationales invoked by the Pre-Trial Chamber[23] – provide a further basis for the use of *ex parte* and/or under seal filings and issuance of decisions. The need to ensure that the ongoing investigation is not endangered has been recognized as an accepted basis for the making of sealed, *ex parte* filings, in the growing pre-trial jurisprudence of the ICC. In an application for warrants of arrest filed before Pre-Trial Chamber II,[24] the OTP submitted, *inter alia*, that "continuing the investigation under the current condition of confidentiality best serves the interests of the investigation, as well as those of potentially vulnerable groups."[25] When issuing the requested warrants under seal the Chamber decided that "the Prosecutor's request that the Prosecutor's application and all the proceedings relating thereto be treated as under seal and be kept under seal" and considered "the Prosecutor's request as to confidentiality to be proper and justified in the circumstances described in the Prosecutor's application".[26]

17. It is submitted that the Statute offers ample support for this particular basis for filings being made under seal and *ex parte*: first, Article 54 (3) (f) provides that the Prosecutor may take "…necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence". Second, Article 57 (3) (c) empowers the Pre-Trial Chambers to take adequate measures to provide for the "preservation of evidence", a critical component of the integrity and efficiency of any investigation. Third, under Rule 81 (2) the Prosecution may apply for authorization for non-disclosure where it is in possession or control of material or information which must be disclosed in accordance with the Statute, but such disclosure may prejudice further or ongoing investigations, and the matter shall be heard on an *ex parte* basis by the

[23] 20 January 2006 Decision, pp. 3 and 4.
[24] Prosecutor's Amended Application for Warrants of Arrest, 18 May 2005, ICC-02/04-8-US-Exp.
[25] Ibid, para 13
[26] Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, 8 July 2005, ICC-02/04-01/05-1-US-Exp, at pp. 7 and 10.

Chamber. Whereas the provision applies primarily to disclosure to the defence, it clearly reflects the principle that non-disclosure of information and *ex parte* proceedings aimed at protecting the integrity and efficiency of ongoing investigations are permissible under the Court's basic documents.

18. The use of under seal and *ex parte* submissions and filings for the purposes of protecting ongoing investigative efforts is also supported by the law and practice of the ad hoc Tribunals. ICTY Rule 66 (C), which is the basis of ICC Rule 81,[27] provides for the possibility of non-disclosure of information the disclosure of which may prejudice further or ongoing investigations, and a similar provision is included in the ICTR Rules of Procedure and Evidence.[28]

(c) Facilitation of arrest efforts

19. The facilitation of arrest efforts is another factor which necessitates, on occasion, the filing of documents under seal and *ex parte* in order to maximize the prospects of success of ongoing arrest efforts. It is reported that Louise Arbour, former Prosecutor for the ICTY/ICTR "...stated that her policy was to issue only sealed indictments, in order to facilitate the arrest of accused persons. This proved to be a very successful strategy".[29] Under ICTY practice, once the seal no longer serves a valid purpose, the Judge who is seized with the matter may properly lift it and make the indictment and any other related documents public.[30]

20. In the ICC context, this particular basis for the use of *ex parte* and under seal submissions and filings may be found, *inter alia*, in the general authority afforded to the Prosecution by Article 54 (3) (f), by the general authority conferred upon Pre-Trial Chambers to issue such orders and warrants as may be required for the purposes of an investigation under Article 57 (3) (a), and in the general principle that requests for cooperation be treated in a confidential manner by requested States enshrined in Article 87 (3), a principle that would be rendered meaningless

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[27] Brady, "Disclosure of Evidence" in Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (2001), p 418

[28] ICTR Rule 66 (C). For a practical example of the application of these provisions, see *The Prosecutor v Nyiramasuhuko et al*, ICTR-96-8-T, Decision on the Prosecutor Ex-Parte Motion Pursuant to Rule 66(c) to be Relieved of Obligation to Disclose Certain Documents, 31 May 2002.

[29] Jones and Powles, *International Criminal Practice* (2003) p 533

[30] For a specific example, see *Prosecutor v Gotovina*, IT-01-45-I, Order Lifting the Seal on the Amended Indictment, Decision on Leave to Amend Indictment and On Confirmation of Amended Indictment and Order for Non Disclosure and Warrant of Arrest, 8 March 2004.

for the purposes of arrest and surrender if arrest warrants issued by the Court could not, in turn, be issued confidentially.[31]

21. The Prosecution accordingly submits that the Court's basic documents provide a solid normative basis for the use of *ex parte* and under seal filings. It further submits that the these type of filings constitute one of the main tools that the Court has at its disposal to protect interests of fundamental value to the Court as a whole, such as the security and well-being of victims and witnesses, the integrity and efficiency of investigations and the success of arrest efforts aimed at bringing to justice the perpetrators of crimes of international concern.

The Applicability of Article 19 (3)

First aspect: applicability of the second sentence of Article 19 (3) of the Statute and the provisions of Rule 59 of the Rules of Procedure and Evidence to the present proceedings.

22. The Prosecution submits that an analysis of the drafting history, context and object and purpose indicates that the participation regime in Article 19 (3) applies to requests for rulings, challenges to admissibility, and analogous proceedings initiated by the Chamber *proprio motu,* but not to incidental determinations made by a Chamber in the course of performing other functions, such as issuing an arrest warrant. The Prosecution further submits that a sequence is foreseen in the Statute in which proceedings on admissibility under Article 19, with broad participation, are conducted *after* the issuance of arrest warrants.

(a) The interpretation of Article 19 (3)

23. Article 19 (3), second sentence, creates a participation regime for "proceedings with respect to jurisdiction or admissibility". The fact that the provision is attached to Article 19 (3) may at first glance give the impression that it applies only to requests for rulings by the Prosecutor under Article 19 (3). However, Rule 59 indicates that it also applies to such proceedings whether they have arisen pursuant to article 19, paragraphs 1, 2 or 3.

24. Further light is shed on this by a consideration of the drafting history. The provisions on challenges and requests for rulings were always considered in the

[31] For a practical example, see Demande d'Arrestation et de Remise de M. Thomas Lubanga Dyilo Adressée à la République Démocratique du Congo, 24 February 2006, ICC-01/04-01/06-9-US, p. 3 (requesting the State to observe the confidentiality of the request for arrest and surrender an any attached materials).

same paragraph[32] until they were separated at the Rome Conference. When the provisions were part of a single paragraph, it was always clear that the participation provision (now Article 19 (3), second sentence) would apply to both challenges (now Article 19 (2)) and requests for rulings (now Article 19 (3)). The discussion of who could submit observations and when they could do so centred around the making of a challenge or the seeking of a ruling.[33] There appears to be no discussion in the *travaux préparatories* relating to the submission of observations in the context of an article 19 (1) consideration.[34]

25. The Prosecution submits that the procedures set out in article 19 were geared towards substantial hearings, such as challenges and questions, and not preliminary assessments of admissibility which are incidental to other determinations. The Prosecution submits that the reference to Article 19 (1) in Rule 59 (1) takes into account instances where substantial hearings on jurisdiction or admissibility, comparable in nature to challenges or requests for a ruling under Articles 19 (2) or (3), are initiated by a Chamber *proprio motu* under Article 19 (1). This is indicated clearly by the choice of language in Rule 59, which requires the Registrar to provide notification of "any question or challenge of jurisdiction or admissibility."

26. The Prosecution submits that a preliminary and incidental determination on admissibility in the course of another function does not constitute "proceedings with respect to jurisdiction or admissibility" in the sense triggering the regime of Article 19 (3). To impose a full regime of participation and observations for every such preliminary determination – necessarily also applicable to preliminary *ex officio* determinations on jurisdiction – would be unworkable. Any such preliminary *ex parte* determination would of course be without prejudice to the ability of persons or entities to subsequently bring a challenge or participate in hearings on the question of jurisdiction or admissibility at the Article 19 stage of

[32] Discussion Paper on Art 36 (A/AC.249/1997/WG.4/DP.5); Report of the inter-sessional meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, on article 12 [36] (A/AC.249/1998/L.13); Challenges to the Jurisdiction of the Court or the Admissibility of a Case: Working Paper on Article 17 (A/CONF.183/C.1/L.60).
[33] Ibid.
[34] This is further reinforced by the drafting history for Rule 59. For example, in a proposal submitted by Australia, the question of victims' participation is discussed with exclusive reference to challenges and requests for rulings, not rulings under article 19(1). Proposal submitted by Australia concerning Part II of the Rome Statute of the International Criminal Court, concerning jurisdiction, admissibility and applicable law (PCNICC/1999/WGRPE/DP.44), Rule 2.8 and Rule 2.9.

proceedings. Moreover, the Prosecution would also submit that a generous threshold should be applied during any preliminary determinations on admissibility, since a negative determination would be terminative of the issue and would frustrate the ability of victims and the referring entity to participate.[35]

(b) The sequence between warrants and hearings under Article 19

27. Moreover, the Prosecution submits that several features of the Statute indicate a *sequential* approach, wherein admissibility proceedings under Article 19, with broad participation, are in principle held after the issuance of an arrest warrant, for which participation may often be restricted.

28. The *travaux préparatoires* point to an understanding that proceedings on admissibility under Article 19 would arise after the issuance of an arrest warrant. Discussion of the appropriate timing for such proceedings appears to have started from the premise that they would occur at some point after an arrest warrant and before the commencement of the trial; the contentious issues were whether multiple challenges could be made and in what circumstances, if any, a challenge could be made after the commencement of a trial.[36] The Report of the Preparatory Committee exemplifies this understanding: "Preference was expressed for limiting the time within which challenges to jurisdiction or admissibility might be made. It was noted in this regard that States with an interest in a case should be given notice of indictment."[37]

29. A study of the text of the Statute and Rules confirms this understanding. While no provision specifically deals with participation in admissibility proceedings during consideration of an arrest warrant, there are many provisions regulating how to handle such proceedings prior to, during, or after confirmation of charges, and even after commencement of trial. For instance, Article 19 (2) (a) refers to "an accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58", indicating that admissibility proceedings were foreseen

[35] The Prosecution reiterates that, with respect to such *ex parte* preliminary determinations, the importance of the admissibility issue and the terminative effect of a negative determination illustrate the importance of putting the Prosecution on notice and providing it with an effective opportunity to be heard before terminating further steps through a negative decision.
[36] Report of the Ad Hoc Committee for the Establishment of an International Criminal Court (A/50/22), para 156; Report of the Preparatory Committee on the Establishment of an International Criminal Court, (vol 1) (A/51/22), para. 249.
[37] Report of the Preparatory Committee on the Establishment of an International Criminal Court, (vol 1), . (A/51/22), para. 249

after issuance of the arrest warrant. The inclusion of "suspect" – which would have been logical and appropriate if admissibility proceedings were to be entertained prior to issuance of the warrant – was canvassed but ultimately rejected at the Rome Conference as it was considered "too general in scope".[38] Rule 58 (3) also reflects the assumption that the person has been surrendered or has appeared voluntarily at the time of admissibility proceedings,[39] and Rule 59 (1) (b) refers to victims who have already communicated with the Court in relation that that "case", which is only identifiable once a warrant has been issued. Article 19 (4), requires challenges prior to or at the commencement of the trial, with a possible exception for consideration even during the trial. Article 19 (9) provides that "the making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge". Rule 58 (2) refers to a Chamber's ability to "join the challenge or question to a confirmation or a trial proceeding". The detailed regulation for admissibility proceedings after the warrant and up to commencement of trial (and possibly afterward) reflects the understanding that the "earliest opportunity"[40] to bring challenges to the "admissibility of a *case*" is after issuance of a warrant.

30. Indeed, to permit admissibility proceedings, with participation of victims and referring entities, at the stage of issuance of an arrest warrant would produce absurd results. On the one hand, if victims and referring entities are permitted to submit observations, but the suspect is not, then this would seem a curious and unfair process wherein various observers are allowed to participate but the person most concerned is not. On the other hand, if the suspect is permitted to submit observations, then the ICC would have a very curious system wherein suspects are permitted to comment on their own arrest warrants before they are issued. The logical interpretation, avoiding these implausible results, is that admissibility proceedings under Article 19 are held after the issuance of the arrest warrant, when interested parties have the opportunity to submit observations.

31. This interpretation is also consistent with a sound system for the Court's procedure. Arrest warrant applications may frequently be under seal to protect

[38] Challenges to the Jurisdiction of the Court or the Admissibility of a Case: Working Paper on Article 17 (A/CONF.183/C.1/L.60).
[39] Rule 58(3) refers to the person having been surrendered or having appeared voluntarily, using the definite article and without any conditional language.
[40] Article 19(5).

victim and witness security and to avoid forewarning suspects to flee, hide or take other measures to frustrate arrests.[41] By contrast, admissibility proceedings should in principle be open, allowing victims and referring entities to participate and ensuring that chambers have the benefit of all views before reaching conclusions on admissibility of a particular case.

32. Thus, the textual terms, the drafting history and practical considerations all indicate a sequence in which warrants are issued (and unsealed, where applicable), after which admissibility proceedings under Article 19 (by challenge, request for ruling, or *proprio motu* initiation) may commence, at which time the court will have the benefit of observations from the referring entity and victims, as foreseen in the second sentence of Article 19 (3).

33. The foregoing considerations raise a question which the Appeals Chamber may elect to consider;[42] namely, whether issues of the admissibility of any particular case are intended to be raised prior to issuance of an arrest warrant at all. Article 58 (1) (a) requires the Chamber to consider jurisdiction but makes no mention of admissibility. Article 19 (1) indicates that the Court "shall" satisfy itself of jurisdiction but that it "may" satisfy itself of admissibility. It would be a sound construction of the Statute that issuance of warrants should primarily be based on the factors in Article 58. These factors are sufficient to provide a proper legal basis for a warrant. Admissibility determinations should follow subsequently, at a point when the accused, victims and the referring entity will be in a position to submit observations, allowing a chamber to benefit from all submissions before taking a decision. This approach is more consistent with the terms of Article 17 and 19, which refer to "admissibility of a case", given that the scope of a particular "case" in question is only determined upon issuance of an arrest warrant.[43] This interpretation would explain the provisions of the Statute foreseeing admissibility determinations occurring at later stages (confirmation of charges, trial) and with participation of the accused. The interpretation would avoid the pitfalls of making admissibility determinations without the benefit of all views, and would also avoid

[41] See paras. 9-21 above.
[42] The question did not form a ground of appeal in the Prosecution's and thus the Appeals Chamber need not consider the question, but may elect do so in the discharge of its duties and in light of the procedural issues raised by the Appeals Chamber in the Order pursuant to which this document is filed.
[43] Admissibility issues, after initiation of investigation and prior to the crystallization of a "case", are addressed under Article 18 (preliminary rulings regarding admissibility), a provision which deliberately avoids the term "case".

the anomolous consequence of having numerous parties including the suspect debate the issuance of an arrest warrant. It would mean that admissibility of any particular case would be considered at a time when all interested parties are in a position to properly participate.[44]

Second aspect: If Article 19 (3) is applicable, does the Prosecutor contend that the "under seal and Ex parte, Prosecution only" nature of the proceedings have a bearing on the right conferred upon the referring State and/or victims to submit observations under its provisions?

34. In the event that the second sentence of Article 19 (3) does apply to the present proceedings, then the opportunity to submit observations is not unrestrained but is qualified by the Statute and Rules.

35. Rule 58 clarifies that the permissive language of Article 19 (3) (victims may submit observations) does not create an unqualified right, but rather an opportunity which is subject to the power of the Court to control its own procedure: the Court "shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings."

36. Similarly, Rule 59, on notice to victims and referring entities, recognizes limitations with respect to "the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence." Rule 59 should be interpreted consistently with Rule 58 and the power of the Court to decide its own procedures, as well as other provisions in the Statute and Rules on confidentiality and sealed information.[45]

37. In this case, the opportunity for the referring state and the victims to submit observations is necessarily limited at this early stage by the classification of the proceedings as under seal and *ex parte*, for sound reasons of security and effective execution of the arrest. While victims undeniably have an interest in participating in these issues, they also have in interest in security of witnesses and victims and avoiding putting the suspect on notice so that he can take further measures to frustrate any arrest efforts. These interests need not be in conflict; the interest in

[44] At a minimum, the Statute should be construed as expressing a strong preference for post-arrest warrant determinations of admissibility. In any case, if this interpretation is not accepted by the Appeals Chamber, the Prosecution maintains its submission, as discussed above, that determinations on admissibility at the stage of issuing an arrest warrant are incidental determinations, rather than proceedings on admissibility under Article 19.
[45] See paras. 10-14, 16-17 and 20 above.

participation can be served by issuing the warrant and then enabling full participation in admissibility proceedings following execution and unsealing of the warrant. The referring state and victims will have an opportunity to submit observations in the context of any challenges, requests for rulings or other hearings on admissibility that will be held after the unsealing of the warrant.

38. The Prosecution finally notes that other relevant provisions contained in the Court's basic documents provide further support for the position advanced herein. For instance, under Rule 50, the Prosecution may refrain from informing victims or their legal representatives of its intentions to seek authorization to initiate an investigation under Article 15 if the Prosecution decides that so doing would "pose a danger to the integrity of the investigation or the life and well-being of victims and witnesses".[46] As in the case of Article 19 (3), the specific language of Article 15 (3) (victims may make representations) does not provide for an unfettered right of participation, but rather for an opportunity to participate, subject to the Court's authority to efficiently manage its own procedure and to balance competing protected values and interests.

Third Aspect: Are the legal entities and persons envisaged by Article 19 (3), second sentence, aware of the proceedings and if not, why not?

39. As it has been explained at the beginning of this document,[47] the Prosecution filed its appeal *ex parte* and under seal pursuant to a prior protective order issued by the Pre-Trial Chamber. Pursuant to that order the proceedings related to the Prosecution's Application for Arrest Warrant have been conducted *ex parte* and in closed session and both the documents filed by the Prosecution and the decisions made by the Chamber have been maintained under seal.[48] Whereas in subsequent decisions issued after the arrest and transfer of Thomas Lubanga Dyilo the Chamber has unsealed certain decisions and filings, in relation to the instant proceedings the documents contained in the record continue to remain *ex parte* and under seal, absent reclassification by the Appeals Chamber.[49]

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[46] Rule 50 (1)
[47] See para. 4.
[48] See 20 January 2006 Decision.
[49] Decision on Access by Duty Counsel for the Defence to All Documents Relating to the case Against Mr. Thomas Lubanga Dyilo, 30 March 2006, ICC-01/04-01/06-61-Conf (Confidential), p. 4. The Prosecution submits that, for the reasons explained in paras. 5-7 above, that no reclassification should be considered at this stage.

40. For these reasons, and being bound by the Pre-Trial Chamber's order,[50] the Prosecution has not informed any third party to these proceedings, including the entities and persons included in the second sentence of Article 19 (3), of the existence of these proceedings. To the best of the Prosecution's knowledge, such notice has also not been provided by any other organ of the Court.

Conclusion

41. The Prosecution has made its best effort to provide answers to all questions contained in the Appeals Chamber's Order. The Prosecution remains at the Chamber's disposal for the purposes of providing any further submissions and explanations, as required by the Chamber.

Luis Moreno-Ocampo
Prosecutor

Dated this 5th day of April 2006
At The Hague, The Netherlands

[50] The Prosecution notes that disclosing any information pertaining to these proceedings to third parties would have effectively implied a situation of non-compliance with an order, within the terms of Regulation 29.